UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PATRICK COUGH,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-57-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from anxiety and depression, is able to return to past relevant work. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from a depressive disorder and an

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 25, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

anxiety-related disorder – impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 19; that he lacked the residual functional capacity ("RFC") to perform more than simple, routine, repetitive tasks that did not require constant concentration, to do work involving constant contact with co-workers, supervisors or the public, or to do work involving more than low levels of stress, Finding 5, *id*. at 19-20; that in his past work as a pizza deliveryman, as generally performed in the national economy, he was not required to perform tasks that exceeded his RFC, Finding 6, *id*. at 20; that his impairments therefore did not prevent him from performing his past relevant work, Finding 7, *id*.; and that he therefore had not been under a disability at any time through the date of decision, Finding 8, *id*. The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 4 of the sequential evaluation process, at which stage the burden is on the plaintiff to show that he cannot perform his past relevant work. *Goodermote*, 690 F.2d at 7; 20 C.F.R. §§ 404.1520(e), 416.920(e). In considering the issue, the commissioner must make a finding of the plaintiff's RFC, a finding of the physical and mental demands of past work and a finding as to whether the plaintiff's RFC would permit performance of that work. 20 C.F.R. §§ 1520(e), 416.920(e); Social

Security Ruling 82-62, *reprinted in West's Social Security Reporting Service* ("SSR 82-62"), at 813 (1983).

The plaintiff contends that the administrative law judge's RFC finding's are unsupported by substantial evidence of record. *See generally* Statement of Specific Errors ("Statement of Errors") (Docket No. 6). This is so, he argues, inasmuch as the administrative law judge (i) failed to include limitations on persistence and pace found by Disability Determination Services ("DDS") non-examining consultants or to explain why he rejected them, (ii) failed to factor in global assessment of functioning ("GAF") scores indicating that the plaintiff essentially was unemployable, (iii) neglected to quantify the severity of limitations found – for example, determining that the plaintiff could perform work that did not require "constant concentration" but failing to specify the degree of concentration of which he was capable, and (iv) mishandled the issue of side effects of medication. *See generally id*. In addition, at oral argument, counsel for the plaintiff embellished his point regarding the DDS reports, asserting that the administrative law judge had misstated limitations the DDS consultants found on the plaintiff's ability to function in social settings and omitted limitations on his ability to respond appropriately to changes in a work setting. I am persuaded that reversible error was committed with respect to the RFC determination.

I. Discussion

The Record in this case contains two so-called Mental Residual Functional Capacity ("MRFC") assessments that do what an administrative law judge, as a layperson, typically is not qualified to do: translate the raw data concerning a plaintiff's impairments into limitations in ability to function at work. *See* Record at 132-33 (MRFC completed January 22, 2001 by David R. Houston, Ph.D.), 150-51 (MRFC completed March 4, 2001 by Peter G. Allen, Ph.D.); *see also, e.g.*, *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990) (although an administrative law judge is not precluded

from "rendering common-sense judgments about functional capacity based on medical findings," he "is not qualified to assess residual functional capacity based on a bare medical record").

As the plaintiff posits, the RFC found by the administrative law judge deviates – without explanation – in some significant respects from the RFC found by both DDS psychologists. These include the following:

1. That although both Drs. Houston and Allen found the plaintiff to be moderately limited in ability to maintain attention and concentration for extended periods, *see* Record at 132, 150, the administrative law judge found him capable of performing work that did not require "constant concentration," *see* Finding 5, *id*. at 19-20. As counsel for the plaintiff posited at oral argument, the difference between these two formulations is greater than appears at first blush. To say that a person can do work that does not demand "constant concentration" suggests greater functional capacity than to characterize that person as moderately limited in ability to maintain concentration for "extended periods."

2. That although both Drs. Houston and Allen found the plaintiff moderately limited in ability to accept instructions and respond appropriately to criticism from supervisors, and Dr. Allen found him moderately limited in ability to interact appropriately with the general public, *see id*. at 133, 151, the administrative law judge characterized him as capable of doing work that did not require "constant contact" with co-workers, supervisors or the general public, *see* Finding 5, *id*. at 19-20, again seemingly overstating his RFC.

3. That although both Drs. Houston and Allen found the plaintiff moderately limited in ability to respond appropriately to changes in the work setting, *see id*. at 133, 151, the administrative law judge entirely omitted such a restriction, *see* Finding 5, *id*. at 19-20. As counsel for the plaintiff suggested at oral argument, the job of pizza deliveryman, to which the plaintiff was found capable of returning, arguably entails constant changes in work schedule and setting.

For these reasons, the mental RFC finding of the administrative law judge was flawed. That flawed information was, in turn, transmitted to a vocational expert at hearing, *see id*. at 404, undermining the basis of the commissioner's Step 5 finding, *see, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (opinion of vocational expert relevant only to extent offered in response to hypotheticals that correspond to medical evidence of record). On that basis alone, remand for further proceedings is warranted. Nevertheless, for the benefit of the parties on remand, I briefly address the plaintiff's remaining points of error:

1. GAF Omission. The plaintiff complains that the administrative law judge's RFC omits the long-running and consistent assessment of treating psychiatrist Ingrid Runden, M.D., that he had a GAF of 50 as well as the opinion of psychiatrist Sally R. Weiss, M.D., that he had a GAF of 40. *See* Statement of Errors at 5; *see also, e.g.*, Record at 189 (progress note of Dr. Runden dated December 14, 2000), 320-21 (report of Dr. Weiss dated April 23, 2002).[2] This plaint is without merit. As the plaintiff acknowledges, Drs. Houston and Allen had access to Dr. Runden's GAF opinion. *See* Statement of Errors at 3; *see also, e.g.*, Record at 148 (Allen PRTF listing GAF scores). Inasmuch as the DDS consultants factored in the Runden GAF, the administrative law judge had no obligation to consider it or discuss it separately. Dr. Weiss's report postdated the DDS evaluations; however, inasmuch as appears, Dr. Weiss served as a

[2] A GAF score represents "the clinician's judgment of the individual's overall level of functioning." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 32 (4th ed., text rev. 2000) ("DSM-IV-TR"). The GAF score is taken from the GAF scale, which "is to be rated with respect only to psychological, social, and occupational functioning." *Id.* The GAF scale ranges from 100 (superior functioning) to 1 (persistent danger of severely hurting self or others, persistent inability to maintain minimal personal hygiene, or serious suicidal act with clear expectation of death). *Id.* at 34. A GAF score in the range of 41 to 50 represents "[s]erious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." *Id*. (boldface omitted). A GAF score in the range of 31 to 40 represents "[s]ome impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school)." *Id.*
(continued on next page)

private examining consultant hired on behalf of the plaintiff rather than as a treating physician. *See, e.g., id.* at 320-21 (Weiss report), 378 (plaintiff's hearing testimony). The administrative law judge permissibly could choose to rely on DDS reports factoring in the GAF opinion of a treating psychiatrist rather than choosing to credit the GAF opinion of non-treating psychiatrist Dr. Weiss. *See, e.g.*, *Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts."); 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) ("Generally, we give more weight to opinions from your treating sources[.]").

2. Side Effects of Medication. The plaintiff presents two complaints related to the side effects of his medication: (i) that his sensitivity to side effects improperly was used against him to undermine his credibility, and (ii) that his difficulties with medication otherwise were ignored. *See* Statement of Errors at 5-6. I agree that the administrative law judge's approach to the side-effects issue leaves something to be desired.

As the plaintiff points out, *see id.* at 5, Dr. Runden opined: "Unfortunately, he is very sensitive to side-effects so that his disorders are treatment-resistant to medications thus far," Record at 324. The administrative law judge omitted any mention of this opinion (which postdated the DDS reports), instead discounting the plaintiff's credibility in part on the basis that he had given up seemingly beneficial medications and, as of the time of hearing, he had stopped taking any medications other than Ambien as a sleep aide. *See id.* at 18. While, as counsel for the commissioner pointed out at oral argument, at least one consulting physician expressed frustration with the plaintiff's aversion to experiencing any side effects, *see id.* at 215

(boldface omitted).
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(consultation report of gastroenterologist Phillip B. Amidon, M.D., stating: "I had a long discussion with him about the fact that he was 'handcuffing' me, that everything I suggested he said he could not or would not do."), Dr. Runden's opinion lends weight to the plaintiff's side-effects concerns. Remand presents an opportunity for the commissioner to (i) obtain the benefit of a DDS or other medical expert's opinion on the side-effects issue and (ii) reassess the plaintiff's credibility accordingly.

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **VACATED** and the case **REMANDED** for proceedings not inconsistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 3rd day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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